

Since taking a leave of absence from the employer due to a finger injury, the claimant has been able, available and actively seeking other work. Therefore, he has been in unemployment since that time forward and is eligible for benefits.

**Board of Review  
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**Issue ID: 0063 1914 79**

### Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant went on a medical leave of absence from the employer on June 28, 2020. He filed a claim for unemployment benefits with the DUA with an effective date of January 31, 2021. Benefits were denied in a determination issued on March 20, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on June 2, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment while out on a leave of absence and, thus, was disqualified under G.L. c. 151A, §§ 29(a), 29(b), and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not in unemployment while on a leave of absence, is supported by substantial and credible evidence and is free from error of law, where the claimant requested light duty work from the employer prior to taking the leave, but such a work schedule was not available.

### Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. On December 28, 2018, the claimant started working part-time for the employer, a retail store, as a cashier. The claimant's schedule varied. The claimant worked approximately 18-20 hours per week for the employer. The claimant was paid \$12.75 per hour.

2. The claimant's supervisor was the Store Manager.
3. The claimant performed tasks for the employer, including cashier, unloading products, pinning clothing and painting. The claimant needed the use of his index finger to perform these duties.
4. In 2019, the claimant also started working for the 2nd & 3rd employers as a Personal Care Attendant.
5. On May 20, 2020, the claimant injured his right index finger at work.
6. The claimant initially attempted to work light duty for the employer. The employer was having the claimant perform duties that exceeded his light duty functions.
7. The claimant subsequently was advised by his doctor not to work for the employer due to his injury.
8. Effective June 4, 2020, the claimant started to receive workers compensation benefits in connection with the employer. The claimant is receiving \$271.48 per week in workers compensation benefits.
9. The claimant's last date of work for the employer was on June 27, 2020.
10. The claimant has been on a leave of absence from work from the employer's establishment since after June 27, 2020. The leave of absence has been paid by means of workers compensation benefits.
11. The claimant has not been able and available to work for the employer since his last date of work due to his finger injury. The claimant does not know when he will be able and available to work again for the employer.
12. The employer still has work available for the claimant.
13. The claimant continued to work for the 2nd employer and the 3rd employer until January 30, 2021, at which time the claimant was discharged for a lack of work.
14. The claimant filed an initial unemployment claim effective the week beginning January 31, 2021.
15. The claimant's weekly benefit rate is \$773. The claimant's weekly earnings disregard amount is \$257.67.
16. On March 20, 2021, the Department of Unemployment Assistance issued a Notice of Disqualification denying the claimant benefits under Sections 29(a) & 1(r) of the Law commencing the week beginning June 21, 2020, and until he

met the requirements of the Law. The claimant appealed the Notice of Disqualification.

17. In a letter dated April 27, 2021, the claimant's doctor advises:

“My patient [claimant] had contacted our office. He stated he needed a letter. The patient is currently under treatment due to right hand injury. The patient should not do any heavy lifting, pushing, or pulling with the use of his right hand at this time. He could do some activities such as being a greeter at [retail store] for example that do not appear to require any of these activities. I hope this is helpful on [claimant] behalf.”

18. The claimant has not attempted to return to work for the employer since his last date of work in June, 2020.

### Ruling of the Board

In accordance with our statutory obligation, we review the record and the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. In light of Finding of Fact # 6, which establishes that the claimant was capable of and available for light duty work, we reject Finding of Fact # 11, which states that the claimant has not been capable of working or available for work since he went on a leave of absence due to his finger injury. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not in unemployment while on a leave of absence.

The issue before the Board is whether the claimant was in unemployment within the meaning of the Massachusetts Unemployment Compensation statute. G.L. c. 151A, § 29 authorizes benefits be paid only to those in “total unemployment” or “partial unemployment.” These terms are in turn defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

(1) “Partial unemployment”, an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week . . . .

(2) “Total unemployment”, an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

The findings show that the claimant took a leave of absence from the instant employer on June 28, 2020, because he suffered an injury to his finger and could no longer perform his regular work

duties with the employer.<sup>1</sup> The claimant was capable of performing some work, and he attempted to perform light duty work for the instant employer prior to taking the leave, but the employer was ultimately unable to limit his work solely to light duty tasks. The claimant was able to continue working for his other two employers until he was laid off in January, 2021, as these jobs did not exacerbate his injury.

A claimant is not disqualified from receiving benefits if he is temporarily disabled from doing his employer's work, if he is capable of and available to do other work and makes serious efforts to find other work. Fitzgerald, 382 Mass. at 163–164. Here, the record shows that the claimant was capable of and available to perform work other than the instant employer's cashier job when he filed for benefits on January 31, 2021, and there is no indication in the record that he has not been looking for full-time work.<sup>2</sup>

We, therefore, conclude as a matter of law that the claimant has been in total unemployment within the meaning of G.L. c. 151A, § 29(a), during his leave of absence.

Because the facts show that the claimant's temporary separation from the instant employer was involuntary for medical reasons, benefits shall be charged to the solvency account, under G.L. c. 151A, § 14(d)(3).

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<sup>1</sup> The fact that an employment relationship persisted did not mean that “total unemployment” could not exist under the statute. See Dir. of Division of Employment Security v. Fitzgerald, 382 Mass. 159 (1980).

<sup>2</sup> In response to the COVID-19 pandemic, the DUA adopted a policy waiving the work search requirement as of March 8, 2020. See DUA UI Policy and Performance Memo (UIPP) 2020.15; DUA UI Policy and Performance Memo (UIPP) 2021.02, p. 2. The work search requirement was subsequently reinstated on June 15, 2021. See DUA UI Policy and Performance Memo (UIPP) 2021.04. Thus, we note that, even if the claimant had not been seeking work, his qualification for benefits would not be affected during the initial four and a half months of his claim.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning January 31, 2021, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - August 30, 2021**



Charlene A. Stawicki, Esq.  
Member

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS  
STATE DISTRICT COURT  
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:  
[www.mass.gov/courts/court-info/courthouses](http://www.mass.gov/courts/court-info/courthouses)

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

SVL/rh